

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOK, TELLITOCCI, and HAIGHT
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant WILLIE H. PATRICK
United States Army, Appellant

ARMY 20130761

Headquarters, Fort Drum
Elizabeth Kubala, Military Judge
Lieutenant Colonel Olga M. Anderson, Staff Judge Advocate (pretrial)
Major Sean G. Gysen, Acting Staff Judge Advocate (recommendation)
Major Derek D. Brown, Staff Judge Advocate (addendum)

For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA; Captain Timothy J. Kotsis, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major A.G. Courie III, JA; Captain Benjamin W. Hogan, JA; Major Lionel C. Martin, JA (on brief).

24 March 2015

SUMMARY DISPOSITION

COOK, Senior Judge:

A military judge sitting as a special court-martial convicted appellant, pursuant to his pleas, of violating a lawful general regulation, dereliction of duty, making a false statement, and assault consummated by battery, in violation of Articles 92, 107 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907 and 928 [hereinafter UCMJ].¹ The military judge sentenced appellant to a bad-conduct discharge, confinement for three months, and reduction to the grade of E-4. The convening authority approved the adjudged sentence.

¹ One specification of Article 120, UCMJ, abusive sexual contact, was dismissed without prejudice, to ripen into prejudice upon completion of appellate review.

This case is before us pursuant to Article 66, UCMJ. Appellant raises two assignments of error, one of which merits discussion and relief. Appellant also personally raises numerous issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), none of which merits discussion or relief.

BACKGROUND

On 9 March 2013, while on charge of quarters (CQ) duty as the CQ noncommissioned officer in charge (NCOIC), appellant assaulted Private First Class (PFC) MMC in her barracks room. This assault included appellant first gaining access to PFC MMC's room through his role as the CQ NCOIC and then making several sexually suggestive comments to PFC MMC. Although PFC MMC failed to respond to appellant's overtures, he proceeded to repeatedly kiss and grope PFC MMC against her will. After PFC MMC was eventually successful in dissuading appellant from further assaulting her, appellant informed PFC MMC that if she changed her mind, he had a condom in his car.

This misconduct led to appellant being charged, *inter alia*, with violating a lawful general regulation, specifically Army Reg. 600-20, Army Command Policy, para. 4-14(b) (18 Mar. 2008) (Rapid Action Revision, 20 Sept. 2012) [hereinafter AR 600-20], by wrongfully engaging in a prohibited relationship with PFC MMC by touching her breasts and groin with his hands. The charged paragraph of AR 600-20, 4-14(b) was attached to the stipulation of fact entered in conjunction with appellant's guilty plea. This paragraph prohibits relationships between soldiers of different ranks if they:

- (1) Compromise, or appear to compromise, the integrity of supervisory authority or the chain of command;
- (2) Cause actual or perceived partiality or unfairness;
- (3) Involve, or appear to involve, the improper use of rank or position for personal gain;
- (4) Are, or are perceived to be, exploitative or coercive in nature;
- (5) Create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

LAW AND DISCUSSION

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012). "The test for an abuse of discretion is whether the record shows a substantial basis in law or fact for questioning the plea." *United States v. Schell*, 72 M.J. 339, 345 (C.A.A.F. 2013). "It is an abuse of discretion for a military judge to accept a guilty plea without an adequate factual basis to support it" *Weeks*, 71 M.J. at 46.

In essence, appellant avers that his *single* assault against PFC MMC did not constitute a relationship as envisioned by AR 600-20, and the military judge abused her discretion in accepting appellant's guilty plea because she failed to elicit a sufficient factual basis. As a result, appellant argues this court should now set aside the finding of guilty to this specification.

Appellate government counsel concedes appellant was unable to engage in a prohibited relationship with PFC MMC because PFC MMC was able to rebuff appellant's unwelcome advances. However, government counsel further argues that appellant's providence inquiry supports a conviction for the lesser-included offense of attempting to disobey AR 600-20, a violation of Article 80, UCMJ. We agree with government counsel.

This court has previously found that a solicitation to engage in sexual acts did not amount to a relationship as envisioned by AR 600-20 when the verbal advance was rejected. *United States v. Oramas*, ARMY 20051168, 2007 CCA LEXIS 588, at *6-8 (Army Ct. Crim. App. 29 Mar. 2007) (mem. op.). In addition, this court has found that a single incident involving a rejected physical advance including touching and kissing also did not rise to the level of a relationship as defined by AR 600-20. *United States v. Morgan*, ARMY 20000928, 2004 CCA LEXIS 423 (Army Ct. Crim. App. 20 Feb. 2004) (mem. op.). The main rationale behind these holdings, one that we adopt and apply here, is that the "victim's conduct is relevant to whether or not a prohibited relationship was established." *Id.* at *7; *see also United States v. Humpherys*, 57 M.J. 83, 93-95 (C.A.A.F. 2002); *United States v. Moorner*, 15 M.J. 520, 522 (A.C.M.R. 1983) *rev'd in part on other grounds*, 16 M.J. 451 (C.M.A. 1983).

Because PFC MMC rejected appellant's advances, appellant was unable to establish a relationship with PFC MMC that was prohibited by AR 600-20. However, appellant's responses to the military judge during the providence inquiry still establish criminal liability. Appellant's testimony made clear that he *intended* to engage in a prohibited relationship with PFC MMC on 9 March 2013. But for PFC MMC's actions, appellant, a Sergeant (E-5) two ranks superior to his victim, and the CQ NCOIC for PFC MMC's barracks, would have exploited his position and rank to take advantage of PFC MMC—a junior soldier living in the barracks that

appellant had a responsibility to safeguard. Appellant's actions went well beyond mere preparation and included both verbal and physical advances. It is clear from the record that appellant specifically intended to enter into a prohibited relationship.

As such, we are able to affirm the lesser-included offense of an attempt to violate a lawful general regulation under Article 80, UCMJ with respect to Specification 1 of Charge IV. *See United States v. Redlinksi*, 58 M.J. 117, 119 (C.A.A.F. 2003); UCMJ art. 59.

CONCLUSION

The court affirms only so much of the finding of guilty of Specification 1 of Charge IV as finds that appellant:

did, at or near Fort Drum, New York on or about 9 March 2013, attempt to violate a lawful general regulation, to wit: paragraph 4-14(b), Army Regulation 600-20, dated 18 March 2008, by attempting to wrongfully engage in a prohibited relationship with Private First Class (E-3) M.M.C., a soldier of a lower rank, to wit: touching her breasts and groin with his hands, in violation of Article 80, UCMJ.

The remaining findings of guilty are AFFIRMED.

We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). In evaluating the *Winckelmann* factors, we first find no dramatic change in the penalty landscape that might cause us pause in reassessing appellant's sentence. *See Manual for Courts-Martial, United States* (2012 ed.), pt. IV, ¶ 4.e. Additionally, appellant was tried and sentenced at a special court-martial by a military judge and the nature of the remaining offenses still captures the gravamen of the original offenses and the circumstances surrounding appellant's conduct. Finally, based on our experience, we are familiar with the remaining offenses so that we may reliably determine what sentence would have been imposed at trial. We are confident that based on the entire record and appellant's course of conduct, the military judge would have imposed a sentence of at least that which was adjudged.

Reassessing the sentence based on the noted error and the remaining findings of guilty, we AFFIRM the sentence as adjudged. We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and

PATRICK—ARMY 20130761

property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored.

Judge TELLITOCCI and Judge HAIGHT concur.



FOR THE COURT:

A handwritten signature in black ink, reading "Malcolm H. Squires, Jr.", written in a cursive style.

MALCOLM H. SQUIRES, JR.
Clerk of Court